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IN THE

Supreme Court of the United States

October Term, 1970

No. 1426

BENJAMIN T. DELAHAY, JR.,
Appellant,

v.

STATE OF ALASKA, *et al.*,
Appellees.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

This appeal is from the judgment of the Supreme Court of Alaska entered on December 2, 1970, affirming judgment of the Superior Court for the State of Alaska, Fourth Judicial District at Fairbanks. The mandate is set out in Appendix A. An opinion of the court was entered November 2, 1970, and it was reported under the title *Benjamin T. Delahay, Jr. v. State of Alaska, et al.*, in 476 P.2d 908. That opinion is set out in Appendix B herein.

The judgment of the Superior Court which was affirmed is included as Appendix C, and the Memorandum Opinion and Order of the Superior Court is Appendix D. A petition

for rehearing by the Alaska Supreme Court (Appendix E) was filed on November 11, 1970, and an order denying the petition for rehearing (Appendix F) was entered November 27, 1970. Notice of appeal to this court was filed with the Alaska Supreme Court on February 1, 1971.

GROUNDS FOR INVOKING JURISDICTION

This is an appeal pursuant to 28 U.S.C.A. 1257(2) from the decision of the Supreme Court of Alaska upholding the constitutionality of the State statute in question under the United States Constitution.

28 U.S.C.A. 1257(2) allows direct appeal to the Supreme Court of the United States from a state court decision upholding the constitutionality of a state statute which has been challenged as violating the Constitution of the United States. *Harwitt v. Harwitt*, 90 F. Supp. 528 (D.C. Conn. 1950); *Broad River Power Co. v. State of So. Carolina, ex rel.* Daniel, 50 S. Ct. 401, 281 U.S. 537, 74 L.Ed. 1023 (S.C. 1930), affirmed on rehearing 51 S. Ct. 94, 282 U.S. 187, 75 L.Ed. 287; *Bantam Books, Inc. v. Sullivan*, 83 S. Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584 (R.I. 1963); *Corn Products Refining Co. v. Eddy*, 39 S. Ct. 325, 249 U.S. 427, 63 L.Ed. 689 (Kan. 1919).

A further federal question entitling appellant to direct review is whether the lower courts consideration of federal questions raised, or failure to consider federal questions, was proper: *Wolfe v. State of N.C.*, 80 S. Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650 (N.C. 1960), rehearing denied 81 S. Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80; *Honeyman v. Honeyman*, 57 S. Ct. 350, 300 U.S. 14, 81 L.Ed. 476 (N.Y. 1937), appeal dismissed 58 S. Ct. 273, 302 U.S. 375, 82 L.Ed. 312; *Douglas v. State of Alabama*, 85 S. Ct. 1074,

380 U.S. 415, 13 L.Ed.2d 934 (Ala. 1965); *Lovell v. City of Griffin, Ga.*, 58 S. Ct. 666, 303 U.S. 444, 82 L.Ed. 949 (Ga. 1938), judgment confirmed to 197 S.E. 347, 57 Ga. App. 901; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 49 S. Ct. 485, 279 U.S. 737, 73 L.Ed. 931 (Tex. 1929); *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 47 S. Ct. 669, 274 U.S. 651, 71 L.Ed. 1279 (Wis. 1927).

The validity of Section 3, Chapter 117, S.L.A. 1967 (set forth in Editor's Note to annotations to AS 22.15.170) is at issue. Appellant contends that it arbitrarily terminates the terms of District Court judges sitting on the effective date of the act, which terms were specifically granted through prior legislation. Section 3, Chapter 117, SLA 1967, expressly made effective September 1, 1968, by Section 4 thereof, states as follows:

> "Sec. 3. Sec. 3, Ch. 138 SLA 1966 is amended to read:
>
> "Sec. 3. Beginning September 1, 1968 the Alaska Judicial Council shall accept applications for all positions as district judge with all appointments to be made before January 1, 1969. All interested persons including district judges sitting on September 1, 1968 may apply. The term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section, regardless of his qualifications under AS 22.15.160(a)."

The Alaska Constitutional provisions for removal of judges and legislation providing for manner of appointment, qualifications and terms of district judges are set forth verbatim in Appendix G.

QUESTIONS PRESENTED

This appeal presents the following questions:

1. Due Process

a. Whether Amendment 14 of the United States Constitution guaranteeing due process of law is violated by the decision of the Alaska Supreme Court and Section 3, Chapter 117, SLA 1967, providing for the removal from office of district judges in a manner not in accordance with the Constitution of the State of Alaska.

b. Whether the Alaska Supreme Court, in reaching its decision, violated Amendment 14 of the United States Constitution guaranteeing due process of law by refusing to properly consider the federal questions presented before it in brief and argument.

c. Whether Amendment 14 of the United States Constitution granting due process of law is violated by the finding of the Alaska Supreme Court that appellant was bound by a legislative act prior to its effective date, as expressly set by the legislature, or was bound by knowledge of the provisions of an unconstitutional act.

2. Republican Form of Government

Whether Article IV, Section 4, of the United States Constitution guaranteeing, and Section 3 of the Alaska Statehood Act, Public Law 85-508 (77 Stats. 339) requiring, a republican form of government is violated by the decision of the Alaska Supreme Court and Section 3, Chapter 117, SLA 1967, by which the Alaska Legislature acted in such a manner as to remove from office prior to the end of their terms certain judicial officers of the State of Alaska without authority under the provisions of the Constitution of the State of Alaska.

STATEMENT OF THE CASE

Article IV of the Constitution of the State of Alaska (Appendix G) establishes a unified judicial system including a supreme court and a superior court (Sec. 1), empowers the legislature to establish additional courts and set their jurisdiction (Sec. 1), provides means of removal of *all* judges (Secs. 10, 11 and 12) and provides that judges of other courts (than the supreme and superior courts) *shall be selected* in a manner, for terms, and with qualifications prescribed by law (Sec. 4).

Pursuant to authority granted in said Section 1, the Legislature created the district court by enactment of Chapter 15 of Title 22 of the Alaska Statutes and provided qualifications for selection of judges in AS 22.15.160. Originally AS 22.15.170 provided that the presiding superior court judge of each judicial district would appoint district magistrates (subsequently the title was changed to district judges) in his district to serve at his pleasure (Appendix G). (The question was never raised as to whether service "at the pleasure of the presiding judge" was a "term" as required by Sec. 4 of Article IV of the Alaska Constitution.)

Appellant was initially appointed as district judge effective October 25, 1964, by Presiding Superior Court Judge Everett W. Hepp of the Fourth Judicial District (Connelly Dep., p. 4). [All depositions referred to herein are contained in File No. 2 of the Record on Appeal.]

Thereafter the Alaska Legislature enacted Chapter 138, SLA 1966 (Appendix G) which provided for an addition to Chapter 35 of Title 15 of the Alaska Statutes concerning elections to place district judges under terms of office in accordance with the "Missouri Plan" and similar to the

constitutional provisions for supreme court justices and superior court judges (Sec. 1); amending AS 22.15.170 (Appendix G) to omit (and thereby repeal) the provisions that district judges serve at the pleasure of the presiding superior court judge (Sec. 2); acceptance of applications for all positions as district judge beginning September 1, 1967, with all appointments to be made *before* January 1, 1968 (Sec. 3); and Sections 1 and 2 *to take effect on January 1, 1968* (Sec. 4). (No effective date being expressly provided for Sec 3, it became effective under Alaska law on August 7, 1966.)

Subsequently the Alaska Legislature enacted Chapter 117, SLA 1967 (Appendix G) amending AS 22.15.160 as to qualifications of district judges and AS 22.15.170 to provide for appointment of district judges by the governor from names submitted by the Judicial Council in Sections 1 and 2 (no question is raised as to the constitutionality of these two sections).

In addition, this act purported to amend Section 3, Chapter 138, SLA 1966, to provide that, *beginning September 1, 1968*, the Alaska Judicial Council should accept applications *for all positions as district judge* with all appointments to be made before January 1, 1969 (Sec. 3), and *the act was expressly made effective September 1, 1968* (Sec. 4).

On November 17, 1967, pursuant to Section 3, Chapter 138, SLA 1966 (Appendix G) Everett W. Hepp, Presiding Superior Court Judge of the Fourth Judicial District, appointed Appellant to the position of district judge effective November 20, 1967 (Pl. Ex. B attached to Hepp Dep.).

On December 30, 1968, Governor Walter J. Hickel pur-

ported to appoint Appellee Arthur Lyle Robson to the position of district judge held by Appellant.

On January 3, 1969, Appellant filed a complaint for declaratory judgment (R. 1-5) on page 3 in which Appellant first raised the federal questions herein sought to be reviewed as follows:

> "That AS 22.15.170(a), as amended by Chapter 117, Section 3, SLA 1967 and by Chapter 132, Section 1, SLA 1968, is null and void in its application to the term of the judicial office held by Plaintiff Benjamin T. Delahay, Jr., as violative of Article IV, Section 4 of the Constitution of the United States of America, guaranteeing to every State of the Union a republican form of government, and as violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, in that enforcement of AS 22.15.170(a), as so amended, abridges the privileges and immunities of Plaintiff Benjamin T. Delahay, Jr. a citizen of the United States of America, and deprives said Plaintiff Benjamin T. Delahay, Jr. of his office as District Judge without due process of law."

> "VIII

> "That application of AS 22.15.170(a), as so amended, to the term as District Judge held by Plaintiff Benjamin T. Delahay, Jr., violates the fundamental principles of the separation of the legislative, executive and judicial powers of government and of the traditional independence of the judiciary from political manipulation and coercion, universally accepted and adhered to by the States of the Union, the United States of America, and the delegates to the Alaska Constitutional Conventions, in consideration of Article IV of the Alaska Constitution."

By letter dated January 13, 1969, Presiding Superior Court Judge Hepp informed Appellant that he was terminating Appellant as a District Judge at his pleasure (Pl. Ex. C attached to Hepp Dep.). On February 1, 1969 Appel-

lee Arthur Lyle Robson was given the oath of office as District Court Judge and has served in that capacity ever since (Hepp Dep., p. 17).

On February 11, 1969, Appellant filed an Opposition to Defendants' Motion to Dismiss and Amended Motion to Dismiss (R. 29-39) on page 3 of which it is stated:

> "There is a real question as to whether such a deprivation of office infringes the protection of the Alaska Constitution and the United States Constitution."

This motion was denied by minute order of February 25, 1969 (R. 40).

On February 27, 1969, Appellant filed an Amended Complaint for declaratory judgment (R. 41-47) in which the federal questions were raised in the same words as quoted *supra* from the original complaint.

On October 2, 1969, Appellant filed Motion for Summary Judgment (R. 56) and Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment (R. 57-92) which again raised (at pp. 29-32 thereof) the two federal questions sought to be reviewed here, by alleging that interpretation of the statutes and provisions of the Alaska Constitution in such a manner as to terminate Appellant's term of office would be so contrary to their express language and intent as to deprive the Appellant of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and would so interfere with the separation and independence of the judiciary from the other branches of government as to violate the federal guarantee to each state of a republican form of government under Article IV, Section 4, of the United States Constitution. These arguments were again referred to in Appellant's Reply Memorandum filed Octo-

ber 15, 1969, to Appellees' Cross Motion for Summary Judgment. The Memorandum Opinion and Order (R. 112-118) filed February 11, 1970, by the trial court ignored the federal questions presented, and the Summary Judgment (R. 121) filed February 13, 1970, denied Appellant's Motion for Summary Judgment and granted Appellees' Motion for Summary Judgment.

On February 13, 1970, Appellant filed Notice of Appeal (R. 120), and on February 25, 1970, Appellant filed Statement of Points on Appeal (R. 126-127) one of which stated:

> "b. The attempt of the Alaska Legislature to terminate Plaintiff as District Judge through enactment of Section 3, Ch. 117, SLA 1967, was null and void as violative of the Constitution of the State of Alaska and the Constitution of the United States of America."

This contention was amplified in Appellant's Brief at pages 38-42 under the heading "Foreshortening of Appellant's Term as District Judge is Violative of the United States Constitution," with subheadings: "1. Due Process Violation" and "2. Republican Form of Government Violation." [All briefs referred to herein are contained in File No. 3 of the Record on Appeal.]

Appellee at page 15 of its brief replied at length to the republican form of government argument. At page 23 Appellee stated that he assumed Appellant had abandoned the federal due process argument. In his Reply Brief, Appellant unequivocally stated that this argument was not abandoned. Indeed, he stated at page 21 that in addition to the statute itself violating the Fourteenth Amendment, Superior Court Judge Taylor's interpretation of the Alaska Constitution violated federal due process.

The Alaska Supreme Court in its Opinion (R. 143) failed to reach the republican form of government issue on the contention that it was inadequately raised because no case law was briefed on this point. In a footnote thereto, the Alaska Supreme Court likewise cavalierly disposes of the federal question as to due process. Appellant contends that where these federal questions were presented, briefed, and argued at every stage of the proceeding, the questions must be decided whether or not briefed to the extent desired by the court as more fully set forth in the Petition for Rehearing (R. 150-153) (Appendix E).

By the sleight of hand of applying Section 3, Chapter 117, SLA 1967, to Appellant before its effective date and ignoring Appellant's tenure acquired under Section 1 and Section 2, Chapter 138, SLA 1966, the Alaska Supreme Court bypassed the federal due process issue explicitly and implicitly argued throughout Appellant's case, pleadings and briefs in this language (R. 145):

> "We are of the opinion that on the particular facts of this record this potentially significant issue is not raised. Had appellant been appointed for a set term, later shortened, the issue would be raised, but appellant was appointed to serve, at least initially, as Judge Hepp's pleasure, and therefore cannot complain of having had his term shortened. By the time appellant was appointed, the legislation ousting him had been passed by the legislature and approved by the governor, though it had not yet taken effect. Appellant knew from the inception of his November 1967 appointment that he had no term of office extending until the 1970 general election."

Appellant contends that knowledge of an unconstitutional act is not binding upon Appellant and such knowledge cannot transform an unconstitutional act into a constitutional act. Appellant further contends that the decision of the

Alaska Supreme Court giving effect to a statute prior to its effective date expressly established by the legislature is a violation of due process under the Fourteenth Amendment to the Constitution of the United States.

Appellant contends that in upholding the statute in question the Alaska Supreme Court failed to give adequate consideration to the federal questions raised in this case.

FEDERAL QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

1. Due Process Violation

This question is of paramount importance. If state legislatures, executives, or courts can ignore the orderly processes set up by their own constitutions (as all three branches in Alaska have in this case ignored the provisions for removal of judges and the restrictions of the legislature to setting terms, qualifications, and manner of appointment of judges of other courts *only* at the time of selection as contained in Article IV of the Alaska Constitution), then there will *be* no due process of law and the bulwark our citizens have against encroachment upon their rights by men in power will be completely lost. If by tricky evasion and subterfuge, constitutional guarantees can be evaded and statutes (such as AS 15.35.100 to 130 giving district judges terms and tenure effective January 1, 1968) are not followed, then our citizenry in all fields and walks of life are subject to the uncontrolled whim of men in power—our vaunted "government of laws and not of men" is a mere mockery and a delusion.

2. Violation of Republican Form of Government

Although Appellant has found no federal cases in point

on this federal question, no provisions of the constitution would ever have been enforced had the courts refused to decide questions arising thereunder until case law was presented—there must be the first such case and the basic document must then be interpreted.

If this provision were not of utmost importance, then why would the republican form of government be guaranteed to the states by the United States Constitution and why would the Congress of the United States in the Alaska Statehood Act *(supra)* have specifically stated "The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence"? And of what merit is it to preserve the *form*, if it is merely a facade which is deliberately, cynically and contemptuously ignored?

The architects of our nation felt the distribution of power to three branches of government was essential to preserve our liberties, and a failure to preserve the structure by allowing one ascendant branch to subjugate another would result in a denial of liberty. The independence of the judiciary from the other branches is particularly vital if impartial justice is to be meted out to litigants before the court. As stated by George M. McLaughlin, the Chairman of the Committee on the Judiciary Branch, which drafted Article IV, as recorded in I Alaska Constitutional Convention Proceedings 584 (in advocating the Missouri Plan of appointment rather than election of judges):

> "I might also point out that one of the dangers of the elective system is the fact that a judge whenever he makes a decision, has to keep peering over his shoulder to find out whether it is popular or unpopular. If we determine the validity of our laws in terms of

> popularity as the general acceptance, we are then not a government of laws on which we pride ourselves."

As dangerous, *or* more so, is the subjugation of the judiciary to the unbridled political whims of the legislature.

The right to an independent judiciary, unfettered by political manipulation by the legislative and executive branches of government, is the touchstone of the democratic form of government. Should this right ever be weakened, even for a moment, or taken away, all the safeguards and grand design of our form of government will dissolve and disappear. Preservation of this bulwark of freedom in our states is as vital as on a national level. Notwithstanding the nimble employment of legal gymnastics by the Alaska Supreme Court to avoid deciding the issues raised herein on the merits, this appeal poses legal questions of the first magnitude which must be squarely met and resolved.

Respectfully submitted,

MERDES, SCHAIBLE, STALEY & DELISIO
Counsel for Appellant

Of Counsel:
BENJAMIN T. DELAHAY, JR., *Prose*

APPENDIX A

THE SUPREME COURT
OF THE STATE OF ALASKA

BENJAMIN T. DELAHAY, JR., *Appellant,* v. STATE OF ALASKA, *et al.*, *Appellees.*	File No. 1252 MANDATE

To: Superior Court of the State of Alaska
Fourth Judicial District at Fairbanks.

Benjamin T. Delahay, Jr. filed an appeal from a judgment of the Superior Court, Fourth Judicial District, at Fairbanks in Civil Action No. 69-10 entitled "BENJAMIN T. DELAHAY, JR., District Judge, Fourth Judicial District, State of Alaska, Plaintiff, vs. STATE OF ALASKA, et al, Defendants." The case was heard by this court on September 11, 1970. On November 2, 1970 the court filed its written opinion. Appellant's petition for rehearing was denied on November 27, 1970.

It Is ORDERED:

1. The judgment of the superior court, entered February 13, 1970, is affirmed.

2. No costs or attorney's fees allowed.

WITNESS The Honorable George F. Boney, Chief Justice of the Supreme Court, State of Alaska, this 2nd day of December, 1970.

(MRS.) JOSEPHINE M. MCPHETRES
Clerk, Supreme Court,
State of Alaska
By: s / BETTY H. BAILEY
Cheif Deputy Clerk

APPENDIX B

THE SUPREME COURT
OF THE STATE OF ALASKA

BENJAMIN T. DELAHAY, JR., *Appellant*, v. STATE OF ALASKA, *et al.*, *Appellees.*	File No. 1252 OPINION [No. 648— November 2, 1970]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Warren Wm. Taylor, Judge.

Appearances: Stephen S. DeLisio of Merdes, Schaible, Staley & DeLisio, Fairbanks, for Appellant. G. Kent Edwards, Attorney General, and Robert J. Mahoney, Assistant Attorney General, Anchorage, for Appellees.

Before: Boney, Chief Justice, Dimond, Rabinowitz, Connor, and Erwin, Justices.

RABINOWITZ, Justice.

This appeal raises questions concerning the legality of appellant Benjamin T. Delahay, Jr.,'s termination as a District Judge of the State of Alaska, as well as issues pertaining to the validity of Arthur L. Robson's subsequent appointment to appellant's seat on the district court. The superior court declared appellant's termination lawful and further concluded that Judge Robson's appointment was in accordance with law. We affirm the superior court's judgment.

The Alaska Constitution vests "The judicial power of the State . . . in a supreme court, a superior court, and the courts established by the legislature."[1] Judges of courts

1. Alaska Const. art. IV, §1.

other than the supreme court and the superior court are to be "selected in a manner, for terms, and with qualifications prescribed by law."[2] In 1959, Alaska's first state legislature established a third tier of courts denominated the district magistrate court. Under this legislation, district magistrates were to be appointed by the presiding judges of the superior court for their judicial district. All district magistrates so appointed served "at the pleasure" of the presiding superior court judges.[3] In 1966, the legislature changed the name of this court to "District Court."[4] Another 1966 act amended the provision pertaining to retention of district judges. The statutory language providing that district judges "shall serve at the pleasure of such presiding judge" was deleted, effective January 1, 1968.[5] Appointive powers remained in the presiding judges of the superior court. Concerning the terms of office of district judges, as of January 1, 1968, all district judges were required to submit themselves periodically to the electorate of their respective judicial districts for approval or rejection.[6] Under this same

2. *Id.* at § 4.

3. SLA 1959, ch. 184, § 12, formerly codified as AS 22.15.170.

4. SLA 1966, ch. 14, § 1, codified as AS 22.15.010, and SLA 1966, ch. 24, § 3.

5. SLA 1966, ch. 138, § 2, amending AS 22.15.170.

6. SLA 1966, ch. 138, § 1. This section reads:

Section 1. AS 15.35 is amended by adding new sections to read:

Sec. 15.35.100. APPROVAL OR REJECTION OF DISTRICT JUDGE. (a) Each district judge shall be subject to approval or rejection at the first general election held more than one year after his appointment. If approved, he shall thereafter be subject to approval or rejection in a like manner every fourth year.

(b) The district judge shall seek approval in the judicial district in which he was originally appointed, or in the district where he has served the major portion of his term. The district judge shall designate on his declaration of candidacy the judicial district in which he was appointed, or the district where he has served the major portion of his term.

Sec. 15.35.110. FILING DECLARATION BY DISTRICT BY DISTRICT JUDGE. Each district judge seeking to succeed himself to office shall file with the secretary of state a declaration of candidacy not less

1966 act, the term of every district judge "sitting on September 1, 1967, expires when an appointment to his position is made under this section"; appointments were to be made by the presiding superior court judges by January 1, 1968.[7]

In 1967, the legislature withdrew the power of presiding superior court judges to appoint district judges, except for temporary acting district judges.[8] The existing appointive system was replaced by one in which the Governor was to appoint district judges from among nominees provided by the judicial council.[9] Under the 1967 act, the terms of all

than 90 days before the date fixed for the general election at which approval or rejection is requisite.

Sec. 15.35.120. REQUIREMENT OF FILING FEE FOR DISTRICT COURT CANDIDATE. At the time the declaration is filed, each candidate for the district court shall pay a filing fee to $30 to the secretary of state.

Sec. 15.35.130. PLACING NAME OF DISTRICT JUDGE ON BALLOT. The secretary of state shall place the name of the district juge who has properly filed a declaration of candidacy on a separate nonpartisan judicial districtwide ballot for the general election at which approval is sought.

7. SLA 1966, ch. 138, § 3. This section reads:

Beginning September 1, 1967, the presiding judge of the superior court in each judicial district shall accept applications for all positions as district judge in his judicial district with all appointments to be made before January 1, 1968. All interested persons including district judges sitting on September 1, 1967 may apply. The term of a district judge sitting on September 1, 1967 expires when an appointment to his position is made under this section.

8. SLA 1967, ch. 117 § 2, repealing and re-enacting AS 22.15.170.

9. *Id.* Alaska Const. art. IV, §8 provides:

JUDICIAL COUNCIL. The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall be concurrent of four or more members and according to rules which it adopts.

district judges sitting on September 1, 1968, were to end when the governor made appointments to their positions, which he was required to do before January 1, 1969.[10]

Appellant was appointed by the presiding judge of the Superior Court of the Fourth Judicial District on November 20, 1967, pursuant to the 1966 act. Thereafter, the governor purportedly made an appointment to appellant's position on December 30, 1968, pursuant to the 1967 statute. In January of 1969, Judge Hepp, then presiding Superior Court judge of the Fourth Judicial District, informed appellant that his commission expired at the end of that month.

In this appeal, appellant contends that the superior court's decision was erroneous because by January of 1969 Judge Hepp lacked authority to order the appellant's termination as district judge; that SLA 1967, chapter 117, section 3, which purported to terminate appellant as district judge. was unconstitutional; that under the Alaska Constitution appellant was not removable as district judge; and even if SLA 1967, chapter 117, section 3 was found constitutional, appellant was entitled to retain his office as district judge because the state failed to comply with governing statutory requirements in the selection of his successor.

In regard to appellant's first specification of error, we

10. SLA 1967, ch. 117, § 2 provided in part that:

The governor shall fill a vacancy in an office of district judge by appointing one of two or more persons nominated by the judicial council. Section 3 of this act further provided:

Beginning September 1, 1968 the Alaska Judicial Council shall accept applications for all positions as district judge with all appointments to be made before January 1, 1969. All interested persons including district judges sitting on September 1, 1968, may apply. The term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section, regardless of his qualifications under AS 22.15.160(a).

believe appellant's position is correct. The relevant statute originally provided that district judges "shall serve at the pleasure of such presiding judge."[11] In 1966, the legislature amended Alaska's Election Code to provide for the retention or rejection of district judges by the electorate. This portion of the 1966 act was made effective January 1, 1968, and from that time on district judges were to serve subject to periodic approval or rejection of the voters in their judicial districts. In light of the foregoing, it follows that by January 1969 Judge Hepp, the presiding Superior Court judge of the Fourth Judicial District, had lost his authority to remove or terminate appellant as a district court judge.

This brings us to a consideration of appellant's second specification of error. Here appellant argues that section 3, chapter 117, SLA 1967 is unconstitutional in so far as it purported to terminate appellant as a district judge. As mentioned previously, in 1967 the legislature withdrew from the presiding superior court judges the power to appoint district judges except for the category of temporary acting district judges. In place of the former system of selection, the legislature provided that:

> Beginning September 1, 1968 the Alaska Judicial Council shall accept applications for all positions as district judge with all appointments to be made before January 1, 1969. . . . *The term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section* . . . .[13] (emphasis added)

Appellant contends that this statute contravenes the pro-

11. SLA 1959, ch. 184 § 12, formerly AS 22.15.170.

13. SLA 1967, ch. 117, § 3. Appellant was appointed to the district court on November 20, 1967, and thus was sitting on September 1, 1968, for purposes of SLA 1967, ch. 117, § 3. The governor apparently made an appointment to appellant's position on December 30, 1968, under this 1967 act.

visions of article IV, section 4 of the Alaska Constitution which says:

> Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing and additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

Appellant reads the second sentence of this provision to mean that the term of a district judge must be the one designated by the legislature at the time of his appointment, and cannot be changed later. More specifically, appellant argues that at the time of his appointment in November of 1967, his term as a district judge was to run until Judge Hepp dismissed him at his pleasure before the end of 1967, or until the voters of his judicial district rejected him at the 1970 general election, one of his required periodic rentention elections.[14]

We are of the opinion that section 3 of chapter 117, SLA 1967 does not violate the provisions of article IV, section 4 of the Alaska Constitution. At the time appellant was appointed to the district court in November 1967, *the existing statutory scheme did not permit him to continue as a district judge until he failed to obtain the voters' approval at a required periodic election.* Under the 1966 act, appellant could have been dismissed at Judge Hepp's pleasure at any time from his appointment on November 20, 1967, until January 1, 1968.[15] We believe this circumstance dis-

14. If appellant failed to stand for retention at one of his required periodic elections, his term as a district judge would have been terminated.

15. SLA 1966, ch. 138. Under this act, the new provisions providing for the retention or rejection of district judges by the electorate did not become effective until January 1, 1968, which was subsequent to appellant's appointment. Thus, the presiding superior court judges pos-

tinguishes appellant's case from the situation of a judge who assumed his office under legislation providing for a fixed term of office which is later shortened by the legislature. Appellant took his seat with no statutory requirement that he be permitted to keep it as long as a single day. Section 3 of chapter 117, SLA 1967, which was approved by the governor prior to appellant's appointment in November 1967, did not really shorten a fixed term of office but merely changed the manner of ending a term.[16] *Accepting appellant's construction of the second sentence of article IV, section 4 of the Alaska Constitution, here we do not have an instance where the legislature has changed an existing term of office of a district court judge.*

Appellant next advances five separate constitutional arguments in support of his contention that he was unlawfully terminated as a district judge. Initially, appellant asserts that an independent judiciary is essential to a republican form of government. Viewing section 3, chapter 117, SLA 1967 as a serious detraction from the independence of the entire judicial system of this state, appellant argues that this act is violative of the republican form of government guarantee of the United States Constitution.[17]

sessed the power to remove, at their pleasure, district judges until January 1, 1968, at which time the retention-rejection election amendments became law.

16. Prior to appellant's November 1967 appointment to the district court, the legislature, by virtue of its enactment of section 2 and 3 of chapter 117, SLA 1967, had clearly indicated its intent, effective September 1, 1968, to institute new procedures for the selection of district judges and to terminate the terms of all district judges who had gained office under the prior selection procedures.

17. Article IV, Section 4 of the United States Constitution says: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (where the legislature cannot be convened) against domestic violence."

Alaska Statehood Act § 3.72 Stat. 339 (1958) requires in part that "[t]he constitution of the State of Alaska shall always be republican in form."

It has long been the law that questions arising under the guarantee of a republican form of government are political, not judicial, which is to say that Congress decides whether a form of government is "republican."[18] On the ground of nonjusticiability, the United States Supreme Court has refused to decide whether initiative and referendum,[19] or delegation of legislative power to other branches[20] violate the republican form of government guarantee.[21] Since appellant makes no attempt to brief the effect of the case law construing the Guarantee Clause, we do not consider the point adequately raised and do not reach it.[22]

Appellant further contends that his removal from the office of district judge was contrary to the provisions of article IV, sections 10, 11, and 12 of the Alaska Constitution. Article IV, section 10 of the Alaska Constitution provides that:

> The Commission on judicial qualifications shall consist of nine members, as follows: one justice of the supreme court, elected by the justices of the supreme court; three judges of the superior court, elected by the judges of the superior court; one judge of the district court, elected by the judges of the district court; two members who have practiced law in this state for

18. *Luther v. Borden,* 7 How. 1, 42, 12 L.Ed. 581, 599 (1849).

19. *Pacific Tel Co. v. Oregon,* 223 U.S. 118, 56 L.Ed. 377 (1912); *Kiernan v. Portland,* 223 U.S. 151, 56 L.Ed. 386 (1912).

20. *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612, 81 L.Ed. 835, 840 (1937); *Ohio v. Akron Park Dist.,* 281 U.S. 74, 80, 74 L.Ed. 710, 715 (1930).

21. *See generally* Banfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513 (1962).

22. In his brief appellant states in a single conclusory sentence, without citation of any authority, that a construction of the 1967 legislation upholding his dismissal would deprive him of due process. *Even if appellant's reply brief could be considered,* we find the argument on this point inadequate for resolution of appellant's novel constitutional claim. *Hoblit v. Greater Anchorage Area Borough.* 473 P.2d 630, 632 (1970).

> ten years, appointed by the governing body of the organized bar; and two persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

Article IV, section 11 provides that "[j]ustices and judges should be retired at the age of seventy except as provided in this article." Article IV, section 12 provides that:

> Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

Appellant states that he was not removed under section 10, retired under section 11, or impeached under section 12. He therefore concludes that since the Constitution of Alaska makes no other provision for removal of judges during their term of office, he was improperly terminated as a district judge. We believe this contention is disposed of by our holding that section 3, chapter 117, SLA 1967 was constitutional in light of the circumstances existing at the time of appellant's November 1967 appointment to the district court. In short, we have previously found that under appellant's appointment of November 1967 he did not gain a fixed term of office.

We think that appellant's separation of powers argument can be disposed of on similar grounds. Appellant argues that the Alaska Constitution, by its division into separate

articles of the powers of the legislative, executive, and judiciary implies a requirement of a system of separation of powers with an independent judiciary. Appellant contends that if the constitution is construed to permit the legislature to cut short the terms of district judges, then the legislature could in effect dismiss supreme court justices, as well as superior court judges by changing their qualifications during their terms.

We are of the opinion that on the particular facts of this record this potentially significant issue is not raised. Had appellant been appointed for a set term, later shortened, the issue would be raised, but *appellant was appointed to serve, at least initially, at Judge Hepp's pleasure, and therefore cannot complain of having had his term shortened. By the time appellant was appointed, the legislation ousting him had been passed by the legislature and approved by the governor, though it had not yet taken effect. Appellant knew from the inception of his November 1967 appointment that he had no term of office extending until the 1970 general election.*[23]

Appellant's final specification of error says:

> Assuming arguendo that Section 3, Chapter 117, SLA 1967 was a constitutional exercise of legislative

23. Appellant has also advanced the argument that since the district court was created pursuant to article IV, section 1 of the Alaska Constitution it is a constitutional court and under the analogous federal provision terms of judges of "constitutional courts" cannot be shortened by Congress. Therefore, appellant reasons, terms of Alaska district judges cannot be shortened by the legislature. Article IV, section 1 of the Alaska Constitution provides in part that "[t]he judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature." Article III, section 1 of the United States Constitution provides where pertinent that "t[]he Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour . . . ." Since Alaska's Constitution lacks a provision similar to the quoted portions of article III, section 1 of the United States Constitution, we find appellant's argument inapposite.

> power, Appellant was entitled to retain his office as District Judge by virtue of the State's failure to comply with the provisions of said Act in the selection of a successor to Appellant's office.

SLA 1967, chapter 117, section 2 provided that AS 22.15.170(a) should say in part:

> The governor shall fill a vacancy in an office of district judge by appointing one of two or more persons nominated by the judicial council.[24]

Appellant argues first that because the judicial council nominated only four persons for the three district judgeships in the fourth judicial district, it did not nominate sufficient persons to satisfy SLA 1967, chapter 117, section 2, which required two nominees for each of the three offices. Appellant further says that Governor Hickel's December 30, 1968, letter to Chief Justice Nesbett saying, "I am today appointing" Arthur L. Robson as district judge merely expressed an intent to appoint and did not constitute an appointment. By virtue of these actions, appellant argues that the governor failed to comply with the requirement of SLA 1967, chapter 17, section 3 that all appointments be made before January 1, 1969. Since no successor was duly appointed, appellant concludes that his term never ended under SLA 1967, chapter 117, section 3.

Appellees contend that by nominating four persons for three positions, the judicial council complied with the requirement that they nominate at least two persons for each position; the governor could select from among all four

24. SLA 1967, ch. 117, § 3 provided that
[b]eginning September 1, 1968 the Alaska Judicial Council shall accept application for all positions as district judge with all appointments to be made before January 1, 1969 . . . . The term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section, regardless of his qualifications under AS 22.15.160(a).

nominees for the first position, from among three for the second, and between two for the third.

The selection procedure enacted into law by SLA 1967, chapter 117, section 2 follows the constitutional scheme of article IV, section 5 of the Alaska Constitution for appointment of supreme court justices and superior court judges. Study of the proceedings of the Constitutional Convention reveals that the framers of Alaska's Constitution intended to maximize the role of the judicial council in selection of judicial candidates.[25] In light of this historical background, we are in agreement with appellee's position and hold that the judicial council's action in sending the governor only one more nominee than the number of positions to be filled in the fourth judicial district constituted compliance with the requirements of SLA 1967, chapter 117, section 2.

As the trial court pointed out, the statute under which Governor Hickel appointed Judge Robson prescribed no particular form of appointment.[26] Since appellant has not presented any authority or persuasive reason for holding Governor Hickel to a more formal technique of appointment than he employed, we fail to discern any merit in appellant's position that Judge Robson was not duly appointed.

Affirmed.

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25. See the remarks of George M. McLaughlin, Chairman of the Committee on the Judiciary Branch, which drafted article IV. 1 Alaska Constitutional Convention Proceedings 683-84 (Dec. 12, 1955).

26. Research has disclosed no statutory or constitutional provisions which prescribe the form an appointment should follow.

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

BENJAMIN T. DELAHAY, JR., District Judge, Fourth Judicial District, State of Alaska, *Plaintiff*, v. STATE OF ALASKA, *et al.*, *Defendants*.	No. 69-10 SUMMARY JUDGMENT

THIS MATTER came on for hearing before the Court on cross motions for summary judgment, and the matter having been fully argued and submitted to the Court for a decision, and the Court being fully advised in the premises, having heretofore entered herein its memorandum, opinion and order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff's motion for summary judgment is denied;

2. That Defendants' motion for summary judgment is granted and judgment is hereby entered in favor of Defendants against Plaintiff.

DATED this 13th day of February, 1970.

s/ WARREN WM. TAYLOR
Superior Court Judge

APPROVED as to Form.
DISTRICT ATTORNEY, FOURTH JUDICIAL DISTRICT
By [SIGNATURE]

APPENDIX D

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

BENJAMIN T. DELAHAY, JR., District Judge, Fourth Judical District, State of Alaska,
Plaintiff,

v.

STATE OF ALASKA, *et al.*, EVERETT W. HEPP, Presiding Judge of the Superior Court for the Fourth Judicial District, State of Alaska; BUELL A. NESBETT, Chief Justice of Alaska Supreme Court; ROBERT H. REYNOLDS, Administrative Director, Alaska Court System; HUGH H. CONNELLY, Presiding District Court Judge, Fourth Judicial District, State of Alaska; and ARTHUR LYLE ROBSON,
Defendants.

No. 69-10 C.A.

MEMORANDUM OPINION AND ORDER

By their filing of cross-motions for summary judgment, the respective parties agree that there is no dispute as to any material fact in this case. The court has considered the respective memoranda and oral arguments submitted by counsel and all depositions which have been filed herein.

I.

Article IV, Section 1 of the Constitution of the State of Alaska provides:

> "Section 1. Judicial Power and Jurisdiction. The judicial power of the State is vested in a Supreme Court, a superior court, and the *Courts established by the*

> *legislature.* The jurisdiction of courts *shall be prescribed by law.* The courts shall constitute a unified judicial system for operation and administration. *Judicial districts shall be established by law.* [Emphasis supplied]

The foregoing section provides for courts specifically established by the constitution and further provides that courts established by the legislature have a constitutional grant of authority to act. The most significant aspect of this section from the standpoint of this case is that in framing the constitution the writers of this document found it necessary to recognize, and in effect grant to the legislature, the power to establish inferior courts. It should be noted that the section goes on to provide that jurisdiction of courts shall be prescribed by law and judicial districts established by law. It was apparently recognized that the totality of a system necessary to the administration of justice could not be prescribed by the constitution and the legislature must necessarily take action to assure a viable system responsive to the needs of a young and growing state.

Article IV, Section 4 of the constitution of the State of Alaska provides:

> "Section 4. Qualification of Justices and Judges. Supreme Court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, *for terms,* and with qualifications prescribed by law."

Notice that the constitution again provides that the legislature has the authority to perscribe the manner, the term and the qualifications of judges of courts other than the Supreme and Superior Courts. This constitutional grant of

power is not qualified by any restrictions on when, where, how or why the power could be exercised; it is a bare grant of power restricted only by a general requirement that legislation must bear a reasonable relationship to the legitimate legislative end to be achieved.

The only rational conclusion that can be drawn from this is that the legislature is empowered by the constitution of the State of Alaska to establish inferior courts; to prescribe the manner of selection of judges; to prescribe their term of office; *to prescribe qualifications for all judicial offices and to vary or change any of these at any time that it becomes necessary in order to assure a unified and viable system for the administration of justice.*

II.

Section 3, Chapter 138, SLA, 1966, as enacted by the Alaska legislature provided in pertinent part:

> "Beginning September 1, 1967, the presiding judge of the Superior Court in each judicial district shall accept applications for *all* positions as district judge in his judicial district, with *all* appointments to be made before January 1, 1968. All interested persons including district judges sitting on September 1, 1967, may apply. . . ." [Emphasis added]

The effective date of the foregoing enactment was August 7, 1966. This particular legislative act replaced the former section of the Alaska Statutes 22.15.170 and did not include a provision in the former law which provided that District Judges (Magistrates) served at the pleasure of the presiding judge of the judicial district.

Revisions of the Elections Code, Title 15 of the Alaska Statutes, provided that commencing on the 1st of January, 1968, District Judges would be subject to the approval of

the voters at the first general election more than one year after their appointment. The fact that these Sections of Chapter 138, SLA 1966, were made effective on the 1st day of January, 1968, while the appointment provisions were made effective on the 7th day of August, 1966, created a hiatus in the tenure of District Judges appointed between August 7, 1966 and January 1, 1968. In effect they had no real definitive statement as to what their tenure was to be if appointed during this period. It seems obvious that the legislature did not intend that District Judges appointed during this period were appointed for life. The constitutional provision making retirement mandatory at age 70 belies this. It is also obvious that it was not intended that anyone appointed between August 7, 1966, and January 1, 1968, would be subject to voter approval for had this been true the effective date of Sections 1 and 2 of Chapter 138, SLA 1966, would have been August 7, 1966. The most reasonable explanation that can be inferred from this is that it was intended that all appointments during this period would be interim appointments or that appointments during this period would be subject to the pleasure of the presiding judge. The latter explanation seems the more reasonable in view of the specific requirement that all positions be filled between September 1, 1967, and December 31, 1967.

In further support of the foregoing conclusion is the case of *Fisher et al. v. Lynch et al.*, W. Va. (1929) 148 S.E. 484 and the cases cited therein. The principal case involved court commissioners rather than judges, but seems analogous to the situation here involved. The Supreme Court of Appeals of West Virginia stated:

"The general rule is, that where a definite term of

> office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned. Throop on Public Officers, Sec. 453." 148 S.E. 484 at 485.

In the situation that faces the court in this case there is no term prescribed by law so the most reasonable conclusion to be drawn is that all district judges appointed during this period of hiatus were appointed and serving at the pleasure of the appointing authority.

The plaintiff applied for the position of District Judge under the provisions of Sectiin 3, Chapter 138, SLA 1966, and was appointed by order of the presiding judge dated November 17, 1967, effective November 20, 1967. The appointment was made during the period of the aforementioned hiatus in the tenure of district judges. It is concluded then, that the plaintiff was serving at the pleasure of the presiding judge and therefore could be validly terminated by the presiding judge of the judicial district.

III.

The question has been raised as to whether or not the appointment of Judge Arthur L. Robson complied with the requirements of Chapter 117, SLA 1967. This act made several changes with regard to the method of selecting judges, providing principally that all judges must be attorneys; that they must be recommended by the judicial council; and that they must be appointed by the governor. This act was effective the 1st of September, 1968, and directed the Judicial Council to:

> ". . . accept applications for *all* positions as district judges with *all* appointments to be made before January 1, 1969. All interested persons, including district judges sitting on September 1, 1968, may apply. The

> term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section, regardless of qualifications under AS 22.15.160(a)."

The plaintiff contends that Arthur L. Robson was not effectively appointed under this act since he was not given his oath of office or invested until 31 January, 1969, and no written order, document or certificate of appointment was issued by anyone with the apparent or legal authority to issue same.

The facts indicate that the then Governor, Walter J. Hickel, addressed a letter to the Chief Justice of the Alaska Supreme Court on the 30th of December, 1968, in which he stated:

> "I have considered the list of nominees submitted to me by the Alaska Judicial Council for appointment to the offices of the different district judge seats.
>
> I am today appointing the following District Judges:
>
> . . .
>
> *Fairbanks*
> HUGH CONNELLY
> ARTHUR L. ROBSON
> MARY A. MILLER
>
> o o o
>
> Warm personal regards. . . ."

It is doubtful that there is any set rule or prescribed procedure for the formalization of what is, by virtue of an act of the legislature, a purely discretionary act on the part of the executive. There is no prohibition against using a letter as a means of communicating a decision to the persons concerned with the job of converting decision into action. The letter from the Governor to the Chief Justice seems a reasonable means of accomplishing the desired end and so

could not be held to be invalid as a means of communicating the result of what is principally a subjective process.

The question remains as to whether or not this executive decision was sufficiently documented to evidence a valid exercise of discretion. The general requirement seems to be if there is a valid exercise of discretion virtually any document which would tend to prove the exercise of discretion is sufficient.

In this case there was a letter signed by the governor on the 30th day of December, 1968, informing the Chief Justice that these named individuals had been appointed district judges. No further act is required and any further action is mere formality. The statute in question did not prescribe the procedures that were to be employed to effect the appointment; it apparently left these to the discretion of the executive. Since the executive chose to evidence the exercise of his authority to appoint by letter, this is sufficient for the purposes of the act. Had the legislature said that all appointments would be made and all judges invested with their office prior to January 1, 1969, there would be an entirely different matter. The legislature did not and it cannot be said that the means chosen did not comply with the act.

For the reasons stated, summary judgment is granted the defendants.

DATED at Fairbanks, Alaska, this 11 day of February, 1970.

s/ WARREN WM. TAYLOR
Superior Court Judge

APPENDIX E

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

BENJAMIN T. DELAHAY, JR., District Judge, Fourth Judical District, State of Alaska,
Appellant,

v.

STATE OF ALASKA, *et al.*, EVERETT W. HEPP, Presiding Judge of the Superior Court for the Fourth Judicial District, State of Alaska; BUELL A. NESBETT, Chief Justice of Alaska Supreme Court; ROBERT H. REYNOLDS, Administrative Director, Alaska Court System; HUGH H. CONNELLY, Presiding District Court Judge, Fourth Judicial District, State of Alaska; and ARTHUR LYLE ROBSON,
Appellees.

File No. 1252

PETITION FOR REHEARING

COMES NOW Appellant BENJAMIN T. DELAHAY, JR., by and through counsel, and respectfully petitions this Court, pursuant to the provisions of Alaska Supreme Court Rule 35, for a rehearing of Appellant's appeal, for the reason that the Court has overlooked or misconceived a material fact and proposition of law within the meaning of Alaska Supreme Court Rule 35 (a)(2) and has overlooked and misconceived a material question in the case within the meaning of Alaska Supreme Court Rule 35 (a)(3).

In this regard, Petitioner directs the Court's attention to page 8 of the Court's opinion, wherein the Court ruled that the presiding judge, effective January 1, 1968, had "lost his

authority to remove or terminate appellant as a district court judge," by virtue of section 1, Ch. 138, SLA 1966. Petitioner also calls the Court's attention to pages 10 through 11 of this opinion, wherein the Court held that at the time section 3, Ch. 117, SLA 1967, took affect, Appellant was not serving under a term, within the meaning of Article IV, Section IV, of the Alaska Constitution, and therefore such statute did not violate the provisions of the Constitution.

The material fact which Petitioner contends the Court has overlooked is that, pursuant to section 1, Ch. 138, SLA 1966, effective January 1, 1968, all judges then sitting on the district court became subject to approval or rejection at the first general election more than one year after appointment. Thus, even if at the time of Petitioner's appointment (November 20, 1967) he was not appointed for a fixed term, he became vested with a fixed term on January 1, 1968, when said Session Law became effective.

The Court has apparently overlooked in its opinion that section 3, Ch. 117, SLA 1967, though enacted in 1967, did not become effective until September 1, 1968, a full eight months after Petitioner became vested with a fixed term as district judge. While it is true that the 1967 Legislature could have given section 3, Ch. 117, SLA 1967, an earlier effective date or section 1, Ch. 138, SLA 1966, a later effective date, the fact is that the Legislature did not choose to do so.

The first material question presented in this Petition is, had section 3, Ch. 117, SLA 1967, never been enacted or been repealed in 1968, would Petitioner and other judges sitting in the district court on January 1, 1968, be deemed

to have become vested with a term of office as of January 1, 1968, pursuant to the provisions of section 1, Ch. 138, SLA 1966? If so, said judges, including Petitioner, must have become vested with said term as of January 1, 1968. The same answer must apply in the instant case inasmuch as section 3, Ch. 117, SLA 1967, did not become effective until 8 months later, and was therefore not law nor of stature to have any bearing whatever on the operation of law in effect as of that date. In support of this latter proposition, see the authority cited on page 4 of Appellant's Reply Brief.

It must be further noted that section 3, Ch. 117, SLA 1967, did not in fact establish a term of office for district court judges, but functioned only to cut off the term of judges sitting on the effective date of said act. Section 1, Ch. 138, SLA 1966, has never been revised or repealed by the Legislature, and in fact is the statute under which all judges, appointed by virtue of section 3, Ch. 117, SLA 1967, as well as all holdover judges, are currently sitting on the district court.

Secondly, Petitioner requests a rehearing on the "republican form of government" issue discussed in this Court's opinion on pages 12 and 13. This Court refused to consider the point on the ground it was not adequately raised. Each Justice of this Court is sworn to uphold the Constitution of the State of Alaska, and of the United States, and if a valid constitutional question is raised, it must be decided. This Court has no power to close its eyes to argument. If the Court felt the matter was not adequately briefed, the Court had the option of requesting fuller briefing on the point. The Court criticized Appellant in its opinion for making no attempt to brief the effective case law constru-

ing that clause of the United States Constitution. As set forth at page 39 of Appellant's Brief, and to the best of Appellant's knowledge and research, he was unaware of any decision in the United States Supreme Court or other Federal Courts relating to this question as it bore on the independence of the judiciary from other branches of the government. As a result, Appellant, at pp. 40-42 of his brief, argued other authorities, particularly the *Federalist*, in support of his contentions in this respect. Therefore, Appellant asks this Court to reconsider its refusal to reach the "republican form of government" argument presented and to render an opinion with regard to that issue.

DATED this 9th day of November, 1970.

MERDES, SCHAIBLE, STALEY & DELISIO
Attorneys for Petitioner

By /s/ STEPHEN S. DELISIO
Stephen S. Delisio

APPENDIX F

THE SUPREME COURT OF THE STATE OF ALASKA

BENJAMIN T. DELAHAY, JR., *Appellant,* v. STATE OF ALASKA, *et al.*, *Appellees.*	File No. 1252 ORDER

It Is ORDERED:

Appellant's petition for rehearing, filed November 11, 1970, is denied.

Dated: November 27, 1970.

(MRS.) JOSEPHINE M. MCPHETRES
Clerk

By: /s/ BETTY H. BAILEY
Chief Deputy Clerk

Copies to justices and counsel

APPENDIX G

STATUTES AND CONSTITUTIONAL PROVISIONS

THE CONSTITUTION OF THE STATE OF ALASKA:

"Article IV. The Judiciary

Section 1. Judicial Power and Jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, *and the courts established by the legislature.* The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Section 2. Supreme Court. The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.

Section 3. Superior Court. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

Section 4. Qualifications of Justices and Judges. Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

Section 5. Nomination and Appointment. The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

Section 6. Approval or Rejection. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

Section 7. Vacancy. The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

Section 8. Judicial Council. The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

Section 9. Additional Duties. The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

Section 10. Incapacity of Judges. Whenever the judicial council certifies to the governor that a supreme court justice appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the governor shall appoint a board of three persons to inquire into the circumstances, and may on the board's recommendation retire the justice. Whenever a judge of another court appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the judicial council shall recommend to the supreme court that the judge be placed under early retirement. After notice and hearing, the supreme court by majority vote of its members may retire the judge.

Section 11. Retirement. Justices and judges shall be

retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

Section 12. Impeachment. Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

Section 13. Compensation. Justices, judges, and members of the judicial council shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

Section 14. Restrictions. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

Section 15. Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Section 16. Court Administration. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at his pleasure and to supervise the administrative operations of the judicial system."

"Article XII. General Provisions, Section 11.

Section 11. Law-Making Power. As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable,

the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI."

CONSTITUTION OF THE UNITED STATES:

"Article III. Section 1.

Section 1. Judicial power; tenure of office. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

"Article IV. Sections 3 and 4.

Section 3. Admission of new states; power over territory and other property. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. Guarantee of republican form of government. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

"Amendments to the Constitution, Article XIV, Section 1.

Section 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priv-

ileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ALASKA STATEHOOD ACT:

"Sec. 3. The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

AS 22.15.170 (Prior to Amendments in 1966 & 1967)

"Selection and tenure of magistrates. The presiding judge of the superior court in each judicial district shall appoint the district magistrates and deputy magistrates for the district magistrate court for his judicial district. Each district magistrate and deputy magistrate serves at the pleasure of the presiding judge in the judicial district for which appointed. Vacancies shall be filled in the same manner as appointments."

CHAPTER 138, SLA 1966:

"Section 1. AS 15.35 is amended by adding new sections to read:

Sec. 15.35.100. APPROVAL OR REJECTION OF DISTRICT JUDGE.

(a) Each district judge shall be subject to approval or rejection at the first general election held more than one year after his appointment. If approved, he shall thereafter be subject to approval or rejection in a like manner every fourth year.

(b) The district judge shall seek approval in the judicial district in which he was originally appointed, or in the district where he has served the major portion of his term. The district judge shall designate on his declaration of candidacy the judicial district in which he was appointed, or the district where he has served the major portion of his term.

Sec. 15.35.110. FILING DECLARATION BY DISTRICT BY DISTRICT JUDGE. Each district judge seeking to succeed himself to office shall file with the secretary

of state a declaration of candidacy not less than 90 days before the date fixed for the general election at which approval or rejection is requisite.

Sec. 15.35.120. REQUIREMENT OF FILING FEE FOR DISTRICT COURT CANDIDATE. At the time the declaration is filed, each candidate for the district court shall pay a filing fee of $30 to the secretary of state.

Sec. 15.35.130. PLACING NAME OF DISTRICT JUDGE ON BALLOT. The secretary of state shall place the name of the district judge who has properly filed a declaration of candidacy on a separate nonpartisan judicial districtwide ballot for the general election at which approval is sought.

Sec. 2. AS 22.15.170 is amended to read:

Sec. 22.15.170. SELECTION OF DISTRICT JUDGES AND MAGISTRATES. The presiding judge of the superior court in each judicial district shall appoint the district judges and magistrates for the district court for his judicial district. Vacancies shall be filled in the same manner as appointments.

Sec. 3. Beginning September 1, 1967, the presiding judge of the superior court in each judicial district shall accept applications for all positions as district judge in his judicial district with all appointments to be made before January 1, 1968. All interested persons including district judges sitting on September 1, 1967 may apply. The term of a district judge sitting on September 1, 1967 expires when an appointment to his position is made under this section.
Sec. 4. Secs. 1 and 2 of this Act take effect January 1, 1968."

CHAPTER 117, SLA 1967:

"Section 1. AS 22.15.160 is amended to read:

Sec. 22.15.160. QUALIFICATIONS OF DISTRICT JUDGES AND MAGISTRATES.

(a) A district judge shall be a citizen of the United States and of the state, at least 21 years of age, a resident of the state for at least one year immediately preceding his appointment, and at the time of his appointment licensed

to practice law in the State of Alaska. The supreme court may prescribe additional qualifications.

(b) A magistrate shall be a citizen of the United States and of the state, at least 21 years of age, and a resident of the state for at least six months immediately preceding his appointment. The supreme court may prescribe additional qualifications.

Sec. 2. AS 22.15.170 is repealed and re-enacted to read:

Sec. 22.15.170. SELECTION OF DISTRICT JUDGES AND MAGISTRATES.

(a) The governor shall fill a vacancy in an office of district judge by appointing one of two or more persons nominated by the judicial council. The judicial council shall determine the city within a judicial district where the district judge is to sit.

(b) The presiding judge of the superior court in each judicial district may appoint acting district judges as needed to serve a term of no longer than 12 months or until succeeded by an appointment made under (a) of this section, whichever first occurs. An acting district judge shall be a citizen of the United States and of the state, at least 21 years of age, but need not be licensed to practice law in any one of the United States and need not have established Alaska residence before his appointment. Service as an acting district judge is not considered as judicial service for the purposes of ch. 25 of this title.

(d) Vacancies for judges and magistrates shall be filled in the same manner as appointments.

Sec. 3. Sec. 3, ch. 138, SLA 1966 is amended to read:

Sec. 3. Beginning September 1, 1968 the Alaska Judicial Council shall accept applications for all positions as district judge with all appointments to be made before January 1, 1969. All interested persons including district judges sitting on September 1, 1968 may apply. The term of a district judge sitting on September 1, 1968, continues until an appointment to his position is made under this section, regardless of his qualifications under AS 22.15.160(a).

Sec. 4. This Act takes effect September 1, 1968."

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

No.

BENJAMIN T. DELAHAY, JR., *Appellant,*

vs.

STATE OF ALASKA, et al., *Appellees.*

Appeal from the Judgment of the Supreme Court of Alaska

APPELLEES' MOTION TO DISMISS

Appellee, pursuant to Rule 16(1)(b) of the revised Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss appellant's appeal on the grounds that the federal question sought to be reviewed was not properly raised or expressly passed on in the State Supreme Court and the appeal does not present a substantial federal question.

DUE PROCESS AND REPUBLICAN FORM OF GOVERNMENT QUESTIONS WERE NOT PROPERLY PRESENTED TO OR DECIDED BY THE ALASKA SUPREME COURT

Rule 11(a)(8) of the Alaska Supreme Court provides, in part, that briefs submitted to the Supreme Court shall contain:

> The argument, stating clearly the points of fact and of law being discussed, with reference to the page of the record and authorities relied upon in support of each point.

Based on this rule, the Alaska Supreme Court has consistently refused to decide issues that were not properly or adequately briefed. Thus, in the case of *Williams v. DeLay,* 395 P.2d 839, 847 (Alaska 1964) the Alaska Supreme Court said:

> On the last page and a half of their brief the appellants set forth three additional specifications of error, but they failed to support the errors specified by any clear explanation and argument or by any citation to authorities. We need not consider such specifications of error.

See *Weaver v. O'Meara Motor Co.,* 452 P.2d 87, 93 (Alaska 1969); *Isaacs v. Hickey,* 391 P.2d 449, 452 (Alaska 1964); *Watts v. Seward School Bd.,* 395 P. 2d 372, 376 (Alaska 1964); *Gregory v. Padilla,* 379 P.2d 951, 954 (Alaska 1963).

In appellant's initial brief, the entire argument relating to due process consisted of the following paragraph:

> Any interpretation of the statutes or provisions of the Alaska Constitution in question in relation to the issues herein, contrary to Appellant's right to continuation of his term as a District Court Judge, would be so contrary to the express language and intent of said constitutional and statutory provisions as to constitute an abuse of discretion to amount to deprivation to Appellant of due process of law as guaranteed by the Four-

teenth Amendment of the United States Constitution.

[File 3; App. Br. 38] Appellant reiterated this position on pages 21 and 22 of his reply brief but did not cite or discuss any cases or other authorities which would support his position. In disposing of his contention, the Alaska Supreme Court said:

> In his brief, appellant states in a single conclusory sentence, without citation or any authority, that a construction of the 1967 legislation upholding his dismissal would deprive him of due process. Even if appellant's reply brief could be considered, we find the argument on this point inadequate for resolution of appellant's novel constitutional claim. *Hoblit v. Greater Anchorage Area Borough,* 473 P.2d 630, 632 (Alaska 1970).

Delahay v. State, 476 P.2d 908, 912 (Alaska 1970) (note 22).

Appellant's argument relating to the guarantee of a republican form of government, as found on pages 38 through 42 of his brief, does not cite or discuss any cases arising under that provision. Rather, the appellant relied on numerous quotes from *The Federalist* to support his argument. In disposing of this contention the Alaska Supreme Court stated:

> It has long been the law that questions arising under the guarantee of a republican form of government are political, not judicial, which is to say that Congress decides whether a form of government is "republican". On the ground of nonjusticiability, the United States Supreme Court

> has refused to decide whether initiative and referendum, or delegation of legislative power to other branches violate the republican form of government guarantee. Since appellant makes no attempt to brief the effect of the case law construing the Guarantee Clause, we do not consider the point adequately raised, and do not reach it.

Delahay v. State, 476 P.2d at 912. Thus, the Alaska Supreme Court has *expressly* refrained from deciding the two federal constitutional questions presented by the appellant on the grounds that these questions were not properly raised.

Contrary to the position taken by appellant on page 2 of his jurisdictional statement, a federal question entitling appellant to direct review by this Court is not presented by the question of whether a failure of the lower court to consider a federal question was proper. Rather, that issue is merely part of the inquiry whether a federal question was presented to and passed upon by the State Supreme Court and is incidental to its determination. *Honeyman v. Hannun,* 300 U.S. 16, 18, 81 L.Ed. 476, 479 (1937). Generally, when the highest state court fails to pass upon a federal question, it is assumed by the Supreme Court that the omission was due to want of proper presentation in the state court unless the aggrieved party in this Court can affirmatively show to the contrary. *Street v. New York,* 394 U.S., 576, 22 L.Ed.2d 572, 579 (1969). While the issue of whether a federal question was sufficiently and properly raised in the state court is a federal question as to which the U.S.

Supreme Court is not bound by the decision of the state court, it would appear that state law is, in fact, applied when making this decision. Thus, in the case of *Wolfe v. North Carolina,* 364 U.S. 177, 195, 4 L.Ed.2d 1650, 1662 (1960), the court quoted from *John v. Paullin,* 231 U.S. 583, 585, 58 L.Ed. 381, 382 (1913) as follows:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law. [Cases cited] . . . "[W]hen as here there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong." *Nichol v. Cole,* 256 U.S. 222, 225, 65 L.Ed. 900, 905 . . .

Since the state supreme court has not passed on the federal questions urged and they were not properly presented to that court for decision, this Court is without jurisdiction to consider the question in the first instance.

THE DUE PROCESS ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

In effect, appellant contends that he has been deprived of due process of law by virtue of a court decision interpreting the Alaska Constitution in a manner which would not permit appellant's termination as a district judge under a law enacted by the Alaska Legislature. This Court has frequently held that a substantial federal question is not presented by a claim that the appellant is deprived of due process by virtue of an interpretation of a state statute or constitution by the highest court of the state. Thus, in *Ela[illegible] v. Colorado ex rel. Badgley,* 204 U.S. 85, 88-89, 51 L.Ed. 381, 385 (1907), this Court said:

> Indeed, under the circumstances disclosed, if there had been an assertion of a right, title, privilege, or immunity under the Constitution of the United States it would have been so frivolous as not to afford a basis of jurisdiction, since it is foreclosed that a mere contest over a state office, dependent for its solution exclusively upon the application of the Constitution of a state or upon a mere construction of a provision of state law, involves no possible federal question.

See *Nelson v. County of Los Angeles,* 362 U.S. 1, 6, 4 L.Ed.2d 494, 498 (1960); *Neblett v. Carpenter,* 305 U.S. 297, 302, 83 L.Ed. 182, 187 (1939); *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U.S. 679, 680, 74 L.Ed. 1113 (1930); *Preston v. City of Chicago,* 226 U.S. 447, 449, 57 L.Ed. 293, 295 (1913).

It is thus clear, plaintiff's contention that an interpretation of the Alaska State Constitution and a State statute by the Alaska Supreme Court does not present a substantial federal question which would vest jurisdiction over the matter in his Court.

THE REPUBLICAN FORM OF GOVERNMENT ISSUE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Although there have been few cases presented to the Supreme Court involving the construction of Article IV, Sec. 4 of the United States Constitution guaranteeing a republican form of government, the existing cases make it clear that a substantial federal question cannot exist under this clause. Thus in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374, 74 L.Ed. 913, 915 (1930), the Court said:

> No substantial federal question is presented under Sec. 4 of Article IV of the Federal Constitution guaranteeing to every state a republican form of government, as questions arising under this provision are political, not judicial in character.

Since the guarantee found in Sec. 4 of Article IV of the United States Constitution is political in nature, it is dependent for enforcement upon political and governmental action through powers conferred upon the Congress of the United States, and contentions relying on that clause present no justiciable controversy that is reviewable in the Supreme Court of the United States. *Pacific States Tel. & Tel. Co. v. Ore-*

gon, 223 U.S. 118, 150-151, 56 L.Ed. 377, 385-86 (1912); *Marshall v. Dye,* 231 U.S. 250, 256-57, 58 L.Ed. 206, 208 (1913).

CONCLUSION

It is clear from the contentions contained in plaintiff's brief and the cases cited in this motion to dismiss that the Supreme Court should not accept jurisdiction over this case.

Dated, Anchorage, Alaska,
March 29, 1971.

Respectfully submitted,
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COURT, U. S.
Supreme Court, U.S.
FILED
APR 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1426

BENJAMIN T. DELAHAY, JR.,
Appellant,

v.

STATE OF ALASKA, *et al.*,
Appellees.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

APPELLANT'S BRIEF
IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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IN THE

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UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

APPELLANT'S BRIEF
IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

In addition to the other authorities and arguments set forth herein, Appellant respectfully requests the Court to consider incorporated by reference herein Appellant's Jurisdictional Statement filed in this appeal, inasmuch as said statement anticipates and responds at length to most aspects of the arguments raised by Appellees in support of their motion to dismiss.

DUE PROCESS QUESTION WAS PROPERLY PRESENTED TO THE ALASKA SUPREME COURT

In their motion to dismiss, Appellees contend that the manner in which Appellant raised the due process question

to the Alaska Supreme Court was improper. Appellant raised that question by contending that

> "Any interpretation of the statutes or provisions of the Alaska Constitution in question in relation to the issues herein, contrary to Appellant's right to continuation of his term as a District Court Judge, would be so contrary to the express language and intent of the said constitutional and statutory provisions as to constitute an abuse of discretion and to amount to deprivation to Appellant of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution."

Inasmuch as Appellant raised the argument prospectively, and taking into consideration that Appellant had to assume the Alaska Supreme Court would in fact interpret the statutes and provisions of the Alaska Constitution according to their express language and intent, it is difficult to see in what manner the question could have been more explicitly raised or briefed. Appellant had the right to expect that the Alaska Supreme Court would follow the standard rules of statutory and constitutional interpretation in weighing the merits of the appeal before it.

However, the Supreme Court of the State of Alaska, as pointed out in Appellant's jurisdictional statement, abused its discretion by radically deviating from the standard rules of statutory and constitutional interpretation and in the process deprived Appellant of his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The Alaska Supreme Court's conduct in this regard consisted of its outright refusal to consider the federal questions presented before it both in briefs and in argument, and further, and more particularly, by flatly ignoring the effective date of one of the legislative acts bearing materially on the appeal and by giving said

legislative enactment effect prior to the effective date expressly established for it by the Alaska Legislature, thus evading the constitutional issue and avoiding the clear and precise provisions of the Alaska Constitution and effectively denying to Appellant the "due process" required and provided for therein.

REPUBLICAN FORM OF GOVERNMENT QUESTION WAS PROPERLY PRESENTED TO THE ALASKA SUPREME COURT

Appellees submit that the republican form of government question was not properly raised to the Alaska Supreme Court for the sole reason that Appellant therein failed to submit case law in support of his contention, but instead relied upon numerous citations from *The Federalist.*

As Appellant advised the Alaska Supreme Court in his brief and in argument, Appellant had been unable to discover a single case in which any jurisdiction has been called upon to rule upon the republican form of government question as it relates to the removal of constitutionally protected members of the judicial branch of the state government by an act of the legislative branch of that government.

When case law is not available on a question, it certainly cannot be cited in support of an appellant argument. In such instances, the court and parties are compelled to examine the source of the question, in this case the United States Constitution, and seek to discover the true meaning of its language by recourse to whatever sources other than cases may be available. In this instance, the source referred to was *The Federalist,* a most articulate and exten-

sive explanation of the various provisions of the United States Constitution as created and understood by some of the principal drafters of that document. Certainly such authority should not be lightly disregarded by any court which genuinely desires to resolve an issue before it.

In the instant case, it is apparent that the Alaska Supreme Court did not wish to resolve the republican form of government issue. Said court and Appellees are hard pressed to criticize Appellant for failing to cite authorities which are not available and to avoid the issue presented on appeal by Appellant for such specious reason.

THE DUE PROCESS AND REPUBLICAN FORM OF GOVERNMENT ISSUES DO PRESENT SUBSTANTIAL FEDERAL QUESTIONS

As noted in Appellant's jurisdictional statement, the due process of law issue presents a substantial federal question for the reason that the rights of the individual would be utterly meaningless if the highest state court can with impunity, and safe from review by the United States Supreme Court, violate the fundamental rules of statutory and constitutional construction as it suits that court's whim or convenience.

The jurisdiction of this Court is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," *Ward v. Board of County Commissioners,* 253 U.S. 17, 22. It thus becomes the duty of this Court to ascertain,

> ". . . in order that constitutional guaranties may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773.

In *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938), after reciting that the state court said the charge that the ordinance was void because it violated a designated provision of the state or federal constitution without stating wherein there was such a violation was too indefinite to present a constitutional question, this Court held it had jurisdiction, stating:

> "We think that this question was adequately presented and was decided in the instant case. Whether it was so presented and was decided is itself a federal question." [case citations omitted]

In *Rogers v. Alabama*, 192 U.S. 226, 230 (1904), Justice Holmes stated:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

How much more substantial can the due process issue be than when the highest court of the state itself deprives an individual of his right to due process of law?

With regard to the republican form of government issue, Appellees contend that this guarantee is political in nature and is therefore not justiciable. In response to this contention, Appellant directs the Court's attention to *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 663 (1962), wherein this Court addressed itself to the question whether the republican form of government guarantee applies to the manner in which states apportion themselves for the purpose of electing their representatives and government. Although the Court held that, in that instance, the claim pleaded did not rest upon the guarantee clause, the Court pointed out:

"Of course the mere fact that the suit seeks protection

of a political right does not mean it presents a political question." 7 L.Ed.2d, at 681.

The Court went on to note:

> "We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations.' (cases cited) The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political doctrine question." 7 L.Ed.2d at 682.

As raised in the instant case, the republican form of government issue does not involve a political question. In relation to the instant case, it is not appropriate under our system of government to attribute finality to the action of the political departments in terms of their ability to terminate constitutionally protected members of the judicial branch. Furthermore, in the instant case, in many respects Appellant's interest in this litigation is secondary to the right of the people of the State of Alaska to the guarantee and exercise of a republican form of government in the State. The Alaska Statehood Act, Public Law 85-508, 85th Congress, HR 7999, July 7, 1958 (77 Stat. 339), Section 3, sets forth the Congressional mandate, and conditions for admission

into the Union of the State of Alaska:

> "The Constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Such a constitution was adopted by the electorate of Alaska and recognized and accepted by the proper constitutional authority (Congress of the United States), containing provisions protecting the citizens of Alaska from coercion or undue pressures on the judiciary by legislative or executive acts and the *preservation* of this form of government against erosion by legislative acts *is* a proper and necessary function of this Court's jurisdiction.

The Court in *Baker v. Carr* goes on:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of the powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of political questions presence. The doctrine of which we treat is one of 'political questions', not one of 'political cases.' The

> Court cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 7 L.Ed.2d at 685-86.

In the instant case, none of the formulations set forth by this Court in *Baker* is "inextricable" from the case at bar. In fact, the republican form of government issue has never been raised in the particular context it is raised herein. Inasmuch as *Baker* reaffirms that "discriminating inquiry into the precise facts and posture of the particular case" is required on review, the Alaska Supreme Court had, and this Court now has, the obligation to make such an inquiry into the merits of this appeal.

Past decisions of this Court refusing to consider questions involving the Guaranty Clause have concerned cases where the Court was asked to intervene and determine the propriety of the manner in which a legislature performed actions within the realm of legislative power or the executive performed executive functions. The Court has deliberately refused to "intermeddle" in such actions.

The issue now before the Court involves a hitherto unraised application of the Guaranty Clause to attempts of other branches of government to emasculate the judicial branch in defiance of the constitutional mandate for separation of powers. Such a new application of the Guaranty Clause deserves a fresh and careful evaluation by this Court.

CONCLUSION

Appellant submits, based on the foregoing and on its previously filed jurisdictional statement, that the due process and republican form of government issues raised by Appellant herein do present substantial federal questions, and that therefore the United States Supreme Court should accept jurisdiction of this appeal.

DATED this 7th day of April, 1971.

Respectfully submitted,

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